FILED
SEP 15 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(5)

No. 04-848

In the Supreme Court of the United States

BARBARA DOLAN, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARY ANNE GIBBONS
General Counsel
LORI J. DYM
STEPHAN J. BOARDMAN
MARTINA M. STEWART
Attorneys
United States Postal Service
Washington, D.C. 20260

QUESTION PRESENTED

Whether a tort claim for personal injuries arising out of the negligent delivery of mail to a postal customer is a claim "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," within the meaning of the postal exception to the Federal Tort Claims Act, 28 U.S.C. 2680(b).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 5
Argument:
The Federal Tort Claims Act exception for "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" includes personal injury claims arising out of the allegedly negligent delivery of mail directly to a postal customer 7
A. Because the Federal Tort Claims Act is a waiver of sovereign immunity, the language of Section 2680(b) must be construed carefully not to expand the waiver beyond clear congressional design 9
B. The plain meaning of "transmission of letters or postal matter" includes the act of delivering letters or postal matter directly to a postal customer 11
1. Dictionary definitions of "transmission" include delivery 11
2. Historical and contemporary usage of "transmission" includes the act of delivery .. 13
3. The context and structure of the postal exception encompass the direct delivery of mail to postal customers 17

Table of Contents—Continued: Page

C. Section 2680(b) excepts from liability "any claim" arising out of the negligent delivery of mail to a postal customer, including both physical injuries and damage to the mail 18
1. The statutory text does not distinguish between types of injuries 18
a. The text's plain meaning 19
b. The text's legislative evolution 19
c. The exception's purpose 22
2. Petitioner's own arguments support the exemption of personal injury claim 23
a. Petitioner's arguments embrace personal injury claims 23
b. The telegraph analogy is of no help to petitioner 25
3. The historical and logical distinction between petitioner's claim and motor vehicle accidents underscores that a mail recipient's claim of negligent delivery falls within Section 2680(b) 27
4. Tort claims based on the manner in which mail is delivered have a significant potential for fraud 36
Conclusion 42
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abraham v. *Western Union Tel. Co.*, 23 F. 315 (C.C.D. Or. 1885) 25

Cases—Continued: Page

Birnbaum v. *United States*, 436 F. Supp. 967 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1998) 38
Block v. *Neal*, 460 U.S. 289 (1983) 28
Bono v. *United States*, 145 F. Supp. 2d 441 (D.N.J. 2001) 37, 38
Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 34
Brogan v. *United States*, 522 U.S. 398 (1998) 19
Chicago, Rock Island & Pac. Ry. v. *United States*, 220 F.3d 939 (7th Cir. 1955) 30
Commonwealth v. *Closson*, 118 N.E. 653 (Mass. 1918) 33
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 285 (1999) 10
Department of Energy v. *Ohio*, 503 U.S. 607 (1992) 10
Department of Housing & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) 19
Dunlop v. *Munroe*, 11 U.S. (7 Cranch) 242 (1812) .. 16
Gutierrez de Martinez v. *Lamagno*, 515 U.S. 794 (1995) 39
Hall v. *Commonwealth*, 105 S.E. 551 (Va. 1921) 34
Hatzlachh Supply Co. v. *United States*, 444 U.S. 460 (1980) 23, 36, 39
Hunt v. *United States*, No. 01-2462-KHV, 2002 WL 553736 (D. Kan. Apr. 4, 2002) 37
Illinois Cent. R.R. v. *Illinois*, 163 U.S. 142 (1896) 33
Indian Towing Co. v. *United States*, 350 U.S. 61 (1956) 11
Johnson v. *Maryland*, 254 U.S. 51 (1920) 33, 34, 35

Cases—Continued: Page

John Hancock Mut. Life Ins. Co. v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) 21
Kosak v. *United States*, 465 U.S. 848 (1984) 9, 11, 23, 28, 36
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 10
Molzof v. *United States*, 502 U.S. 301 (1992) .. 22, 25, 39
OPM v. *Richmond*, 496 U.S. 425 (1990) 10
Price v. *United States*, 174 U.S. 373 (1899) 10
Regents of the Univ. of Ca. v. *Public Employment Relations Bd.*, 485 U.S. 589 (1988) 14
Robinson v. *United States*, 849 F. Supp. 799 (S.D. Ga. 1994) 28, 34
Smith v. *United States*, 507 U.S. 197 (1993) 9, 10
Sosa v. *Alvarez-Machain*, 124 S. Ct. 2739 (2004) . 9, 22
State v. *Burton*, 103 A. 962 (R.I. 1918) 30
Suchomajcz v. *United States*, 465 F. Supp. 474 (E.D. Pa. 1979) 18, 25, 26
United States v. *Acord*, 209 F.2d 709 (10th Cir.), cert. denied, 347 U.S. 975 (1954) 30
United States v. *Gonzales*, 520 U.S. 1 (1997) 19
United States v. *Hart*, 26 Fed. Cas. 193 (C.C.D. Pa. 1817) (No. 15,316) 34, 35
United States v. *Kubrick*, 444 U.S. 111 (1979) 37
United States v. *Muniz*, 374 U.S. 150 (1963) 39
United States v. *Neustadt*, 366 U.S. 696 (1961) .. 28, 29
United States v. *S.A. Empresa De Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) 8, 23
United States v. *Shaw*, 309 U.S. 495 (1940) 10
United States v. *Turkette*, 452 U.S. 576 (1981) 19

Cases—Continued: Page

United States Postal Serv. v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) 7, 23, 31, 32
United States Postal Serv. v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) 7, 38
Virginia v. *Stiff*, 144 F. Supp. 169 (W.D. Va. 1956) 33
Vogler v. *Greimann*, 78 F. Supp. 575 (D. Alaska 1948) 33
Western Union Tel. Co. v. *Bennett*, 57 So. 87 (Ala. Ct. App. 1911) 26
Western Union Tel. Co. v. *Priester*, 276 U.S. 252 (1928) 26
Western Union Tel. Co. v. *Taylor*, 100 So. 163 (Fla. 1924) 26
White v. *Western Union Tel.*, 14 F. 710 (C.C.D. Kan. 1882) 26
Willman, Ex parte, 277 F. 819 (S.D. Ohio 1921) 33

Constitution, statutes, regulations and rule:

U.S. Const. Art. I, § 8, Cl. 7 7
Act of May 8, 1794, ch. 23, § 13, 1 Stat. 359 14
Act of Apr. 30, 1810, ch. 37, § 39, 2 Stat. 604 13
Act of Mar. 3, 1825, ch. 64, 4 Stat. 102:
§ 40, 4 Stat. 113 14
§ 43, 4 Stat. 114 14
Act of Mar. 30, 1845, ch. 43, 5 Stat. 732:
§ 2, 5 Stat. 733 14
§ 6, 5 Stat. 734 13

Statutes, regulations and rule—Continued: Page

§ 7, 5 Stat. 735 14
§ 11, 5 Stat. 736 14
§ 12, 5 Stat. 736 14
Act of Mar. 3, 1863, ch. 71, § 27, 12 Stat. 705 13
Act of Apr. 19, 1904, ch. 1398, 33 Stat. 186 17
Act of June 7, 1924, ch. 375, 43 Stat. 668 16
Act of May 29, 1928, ch. 859, § 2, 45 Stat. 946 17
Act of June 11, 1940, ch. 305, 54 Stat. 263 17
Act of June 25, 1948, ch. 645, § 1716, 62 Stat. 782 21
Act of July 12, 1950, ch. 460, § 1, 64 Stat. 336 13
Act of May 8, 1952, ch. 247, 66 Stat. 67 16
Act of Mar. 23, 1953, ch. 10, § 1, 67 Stat. 7 13
Act of Aug. 15, 1953, ch. 511, 67 Stat. 614 16
Act of June 29, 1955, ch. 224, 69 Stat. 191 16
Act of Aug. 4, 1955, ch. 560, § 1, 69 Stat 497 13
Act of Jan. 13, 1965, Pub. L. No. 89-1, 79 Stat. 3 17
Act of Oct. 8, 1966, Pub. L. No. 89-633, 80 Stat. 879 ... 17
Act of Feb. 15, 1972, Pub. L. No. 92-232, 86 Stat. 39 17
Act of Jan. 9, 1985, Pub. L. No. 99-1, § 1, 99 Stat. 3 17
Act of Jan. 28, 1987, Pub. L. No. 100-1, 101 Stat. 3 17
An Act Authorizing the Governors of the Several States to Transmit, by Mail, Certain Books and Documents, ch. 168, 4 Stat. 741 14
An Act Authorizing the Transmission of Letters and Packets to and from Mrs. Harrison, ch. 19, 5 Stat. 461 13
Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* 1, 2
28 U.S.C. 1346(b)(1) 2, 21, 1a

Statutes, regulations and rule–Continued: Page

28 U.S.C. 2674 ..... 1a
28 U.S.C. 2679(b)(1) 21
28 U.S.C. 2680 ..... 2, 8, 22, 23, 2a
28 U.S.C. 2680(a) 22, 2a
28 U.S.C. 2680(b) ..... *passim*
28 U.S.C. 2680(c) 19, 22, 28, 3a
28 U.S.C. 2680(d) 3a
28 U.S.C. 2680(e) 22, 3a
28 U.S.C. 2680(f) 22, 4a
28 U.S.C. 2680(g) 4a
28 U.S.C. 2680(h) 29, 4a
28 U.S.C. 2680(i) 22, 4a
28 U.S.C. 2680(j) 22, 4a
28 U.S.C. 2680(k) 9, 4a
28 U.S.C. 2680(*l*) 22, 4a
28 U.S.C. 2680(m) 22, 28, 4a
28 U.S.C. 2680(n) 22, 5a
Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 2(a), 98 Stat. 3192 17
Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.* 22
7 U.S.C. 7760 15
10 U.S.C. 312(a)(5) 16
18 U.S.C. 1696(b) 15
18 U.S.C. 1696(c) 15
18 U.S.C. 1716(b) 15
18 U.S.C. 1716(c) 15
18 U.S.C. 1716(d) 15
18 U.S.C. 1716(e) 15
28 U.S.C. 2401(b) 37
31 U.S.C. 224c (1940) 40
39 U.S.C. 101(a) 8

Statutes, regulations and rule–Continued: Page

39 U.S.C. 403(a) 16
39 U.S.C. 2603 40
39 U.S.C. 3011(a)(2) 15
39 U.S.C. 3014(b) 15
39 U.S.C. 3201(4) (2000 & Supp. II 2002) 15
39 U.S.C. 3210 15
39 U.S.C. 3210(a)(4) 15
39 U.S.C. 3214 15
39 U.S.C. 3217 15
39 U.S.C. 3623(d) 15
39 C.F.R.:
Section 211.2(a) 2
Pt. 320 38
Section 912.2(b) 40
Fed. R. Civ. P. 12(b)(1) 3

Miscellaneous:

Black's Law Dictionary (7th ed. 1999) 11, 12
Comment, *The Federal Tort Claims Act*, 56 Yale L. J. 534 (1947) 35
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Annex (reproduced as a note to Fed. R. Civ. P. 4) 16
Funk & Wagnall's New Standard Dictionary of the English Language (1946) 11
H.R. 9285, 70th Cong., 2d Sess. (1928) 20
H.R. 17168, 71st Cong., 3d Sess. (1931) 20
H.R. 129, 73d Cong., 1st Sess. (1933) 20
H.R. 2028, 74th Cong., 1st Sess. (1935) 20
H.R. Rep. No. 1287, 79th Cong., 1st Sess. (1945) 22

Miscellaneous—Continued: Page

Samuel Johnson, *A Dictionary of the English Language* (1755):
Vol. 1 12
Vol. 2 12
S. 1912, 69th Cong., 1st Sess. (1926) 20
S. 4567, 72d Cong., 1st Sess. (1932) 20
S. 1833, 73d Cong., 1st Sess. (1933) 20
S. 1043, 74th Cong., 1st Sess. (1935) 20
S. 2690, 76th Cong., 1st Sess. (1939) 20
S. Rep. No. 1400, 79th Cong., 2d Sess. (1946) ... 8, 22, 36
1 Thomas A. Street, *Negligent Transmission of Telegrams, in* 1 *Foundations of Legal Liability* (1906) 26
Alexis de Tocqueville, *Journey to America* (J.P. Mayer ed., Doubleday & Co. 1971) 8
1 Alexis de Tocqueville, *Democracy in America* (Vintage Books 1945) 7, 31
1 *The Oxford English Dictionary* (1933) 12, 19
The Royal Standard English Dictionary (1798) 12
Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 36
United States Post Office Dep't, *Annual Report of the Postmaster General For the Fiscal Year Ended June 30, 1946* (1947) 16, 21, 40
United States Postal Serv.:
2004 Annual Report (2004) 8, 36, 40
Domestic Mail Manual (Sept. 1, 2005) 40
Handbook M-41, *City Delivery Carrier Duties and Responsibilities* (2001) 2
Postal Operations Manual (2002) 2

Miscellaneous—Continued: Page

Pub. No. 100, The United States Postal Service: An American History, 1775-2002 (Sept. 2003) 31, 34
Webster's New International Dictionary of the English Language:
(1917) 11
(2d ed. 1948) 11, 12, 18
Webster's Third New International Dictionary (1976) 19
Noah Webster, *American Dictionary of the English Language* (1828) 12

In the Supreme Court of the United States

No. 04-848

BARBARA DOLAN, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-20a) is reported at 377 F.3d 285. The opinion and order of the district court (Pet. App. 1a-13a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 2, 2004. The petition for a writ of certiorari was filed on November 1, 2004, and was granted on April 25, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are reproduced in an appendix to this brief.

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, generally waives the United States' sovereign immunity for suits seeking damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of employees of the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA, however, excepts thirteen categories of governmental activity from that waiver of immunity. 28 U.S.C. 2680; see 28 U.S.C. 1346(b)(1) (qualifying the scope of the waiver). One of those exceptions preserves the federal government's immunity for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

2. Petitioner alleges that she sustained physical injuries when she tripped over packages and other mail delivered to her porch by a mail carrier employed by the United States Postal Service. Pet. App. 2a, 15a; Compl. para. 7.[1] Petitioner subsequently filed an administrative

[1] Because the complaint was dismissed for lack of subject matter jurisdiction, Pet. App. 15a, the record does not reflect whether the mail was left on the porch because petitioner failed to provide a proper mail receptacle or the amount of mail exceeded the space available in the mailbox. See United States Postal Serv., *Postal Operations Manual* § 617.22 (2002) (under specified conditions, "parcels that do not require a signature may be left in a reasonably safe place, such as a porch or stairway that is protected from the weather"); see *id.* § 632; United States Postal Serv., *Handbook M-41, City Delivery Carriers Duties and Responsibilities* §§ 131.35, 131.37, 322.311 (2001); see generally 39 C.F.R. 211.2(a).

claim with the Postal Service. After investigation, the Postal Service denied her claim. Pet. App. 15a; Compl. para. 1.

Petitioner then filed a complaint under the FTCA against the United States and the United States Postal Service in the United States District Court for the Eastern District of Pennsylvania, seeking more than $200,000 in damages. Pet. App. 15a-16a; Compl. paras. 12, 17.[2] The complaint claimed negligence based on the Postal Service's alleged "[c]reating [of] a hazardous condition," and alleged failure "to properly inspect the said porch and the adjacent area," "to maintain the porch in a condition which would protect and safeguard persons lawfully upon the premises and prevent them from falling," "to correct the negligent or hazardous condition," "to post and/or erect and/or set out proper and adequate signs, cones, barriers of warning, in, on and about the said premises," and "to make said premises reasonably safe for its intended purpose." Compl. para. 8. The complaint further alleged that, as a result of the fall, petitioner suffered "severe and permanent injuries to her body, the bones, muscles, tendons, ligaments, nerves and tissues of her body, * * * sustained an aggravation and/or exacerbation of all known and unknown pre-existing medical conditions[, and] * * * suffered internal injuries of an unknown nature, * * * severe aches, pains, mental anxiety and anguish and a severe shock to her entire nervous system and other injuries, the full extent of which is not yet known." *Id.* para. 9.

The United States moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the case for lack of subject

[2] Petitioner concedes that, under the FTCA, the United States is the only proper defendant. Pet. App. 2a-3a, 16a.

matter jurisdiction on the ground that petitioner's claim falls within the postal exception to the FTCA, 28 U.S.C. 2680(b). Pet. App. 4a, 16a. The district court granted the motion, holding that Section 2680(b) bars petitioner's action. *Id.* at 1a-13a. The court held that "[n]egligently placing mail on a porch" falls "squarely within the plain meaning of 'negligent transmission' as that term is used in Section 2680(b)" because the "[t]ransmission of the mail was not complete until the USPS employee placed the mail on the porch." *Id.* at 6a. In the court's view, the statutory text squarely embraces the "unavoidable mishaps incident to the ordinary, accepted operations of the USPS." *Id.* at 7a. In addition, the court reasoned that imposing liability for "accidents stemming from the delivery of the mail would pose a threat of disrupting the governmental activity of ensuring that the millions of pieces of mail handled by the USPS are delivered efficiently." *Id.* at 8a.

3. The court of appeals affirmed. Pet. App. 14a-20a. The court of appeals agreed that the ordinary meaning of "negligent transmission of letters or postal matter," 28 U.S.C. 2680(b), is "the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." Pet. App. 20a. The court further noted that the legislative history of Section 2680(b) "makes plain that Congress intended to protect the government from lawsuits that might be generated by the unavoidable mishaps incident to the ordinary * * * operations of delivering millions of packages and letters each year." *Id.* at 19a. In the court's view, "it is hard to imagine a more ordinary accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees." *Ibid.*

SUMMARY OF ARGUMENT

Section 2680(b)'s exclusion from FTCA liability of "[a]ny claim" arising out of the "negligent transmission of letters or postal matter" applies by its plain terms to petitioner's claim that her mail was negligently delivered to her house. First, the plain and long-established meaning of "transmission" is the transfer or delivery of items like letters from one person to another. That traditional understanding is consistent with how Congress has commonly employed the terms "transmission" and "transmit" in postal statutes since almost the beginning of the postal system itself. Accordingly, when Congress excepted from FTCA liability the "transmission" of mail, Congress excepted the Postal Service's act of delivering the mail to postal patrons.

Second, Section 2680(b)'s bar applies to "[a]ny claim" that arises out of the delivery of mail. The natural breadth of "[a]ny claim" necessarily embraces claims of personal injury as much as claims of damage to the mail itself. Moreover, like the surrounding exceptions, the postal exception is written in terms of the governmental activity protected, not in terms of the particular type of injury suffered. Congress's central concern was to insulate from private regulation, through the medium of tort liability, the vital federal function—what this Court has described as a sovereign necessity—of providing a universal, cost-effective, and secure system for the handling and delivery of mail between postal customers.

Petitioner's remaining arguments prove the government's point. Tort liability for the "transmission" of telegrams included, rather than excluded, liability for at

least some types of personal injury claims caused by the telegram's delivery.

Petitioner makes much of Congress's perceived intent to waive liability for motor vehicle accidents. But this case has nothing to do with the operation of a postal vehicle. In any event, petitioner's argument actually reinforces the government's reading of "negligent transmission of letters or postal matter." Prior to the FTCA's enactment, courts had already drawn a line between, on the one hand, the indirect, incidental, and fleeting effect of applying generally applicable traffic safety regulations to carriers of the mail, and, on the other hand, impermissible efforts to regulate or control directly the evolving and uniquely federal function of handling and delivering the mail as such. Historic practice and longstanding congressional usage of the term "transmission" in the postal context thus inform and reinforce Section 2680(b)'s natural reading, as including the allegedly negligent delivery of mail to a postal customer's home.

Finally, petitioner's insistence that Section 2680(b) simply mirrors the extant procedures for registering and insuring the mail fundamentally misunderstands the limited protection those programs provide. That argument also ignores the enormous potential for fraud arising from both the sheer volume of mail delivery, and the fact that the types of injuries involved generally occur within the close environs of private homes, rarely have disinterested witnesses, and, unlike traffic accidents, would often be unknown to and incapable of being investigated by the Postal Service until significant time has passed.

ARGUMENT

THE FEDERAL TORT CLAIMS ACT EXCEPTION FOR "ANY CLAIM ARISING OUT OF THE LOSS, MISCARRIAGE, OR NEGLIGENT TRANSMISSION OF LETTERS OR POSTAL MATTER" INCLUDES PERSONAL INJURY CLAIMS ARISING OUT OF THE ALLEGEDLY NEGLIGENT DELIVERY OF MAIL DIRECTLY TO A POSTAL CUSTOMER

The postal system is a "sovereign function" because it is a "sovereign necessity." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981); see generally *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 739-740 (2004). "Government without communication is impossible," *Greenburgh Civic Ass'ns*, 453 U.S. at 121, and the postal system is "to many citizens situated across the country the most visible symbol of national unity," *id.* at 122. Just two Terms ago, the Court noted that the Postal Service "has broad[] obligations, including the provision of universal mail delivery, the provision of free mail delivery to certain classes of persons, and, most recently, increased public responsibilities related to national security." *Flamingo Indus.*, 540 U.S. at 747 (citation omitted). Indeed, the Constitution itself recognizes the necessity of empowering Congress to establish a national postal system to unify and connect the Nation. See U.S. Const. Art. I, § 8, Cl. 7 ("Congress shall have Power * * * To establish Post Offices and post Roads.").[3]

---

[3] Alexis de Tocqueville commented upon the extent to which early mail circulation in even remote areas of the United States fueled "intellectual activity" and "powerfully contribute[d] to the support of the democratic republic." 1 Alexis de Tocqueville, *Democracy in America*

Congress thus established the United States Postal Service as a "basic and fundamental service provided to the people by the Government of the United States [and] authorized by the Constitution," and Congress designated as its "basic function" "the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a). In fulfilling that vital function, the Postal Service, in Fiscal Year 2004, delivered more than 206 billion pieces of mail to 142 million delivery points across the United States. United States Postal Service, *2004 Annual Report* 18, 22.

Because the Postal Service could not perform that unique and indispensable service of handling, processing, and delivering mail universally and inexpensively unless "free from the threat of damages suit," S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946), Congress excepted from the general waiver of the United States' immunity under the FTCA "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b); see generally *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984) (exceptions in Section 2680 mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals").

329 (Vintage Books 1945); see Alexis de Tocqueville, *Journey to America* 283 (J.P. Mayer ed., Doubleday & Co. 1971) ("There is an astonishing circulation of letters and newspapers among these savage woods. * * * I do not think that in the most enlightened rural districts of France there is intellectual movement either so rapid or on such a scale as in this wilderness.").

Petitioner's claim for damages, which arises directly out of the allegedly negligent delivery of mail to her home, falls squarely within the plain text of that exception. The exclusion of petitioner's claim is also supported by the structure of the FTCA, the purpose of the postal exception, legislative evolution of the provision, and historic usage of the term "transmission" in postal statutes.

A. Because The Federal Tort Claims Act Is A Waiver Of Sovereign Immunity, The Language Of Section 2680(b) Must Be Construed Carefully Not To Expand The Waiver Beyond Clear Congressional Design

Petitioner straightforwardly alleges negligence in the "delivery of mail." Pet. 4; see Compl. para. 8. Because the delivery of mail is an inherent part of —indeed, is the ultimate purpose of—the "transmission" of mail, petitioner's claim is barred.

"The starting point of [the Court's] analysis * * * must, of course, be the language of § 2680[b]." *Kosak* v. *United States*, 465 U.S. 848, 853 (1984); *Smith* v. *United States*, 507 U.S. 197, 201 (1993) (relying on the "ordinary meaning of the language itself" in interpreting the FTCA's foreign-country exception, 28 U.S.C. 2680(k)). Where the "straightforward language" of an FTCA exception applies, judicially crafted limitations or qualifications on the exception—whether rooted in policy concerns or intimations in the legislative history—have no place. *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2748-2754 (2004).

Furthermore, in determining whether Congress opened to damages liability the government's daily de-

livery of approximately 660 million pieces of mail to tens of millions of locations, the Court must bear in mind that the FTCA is a waiver of the sovereign immunity of the United States. As such, Section 2680(b)'s language must be construed with care to ensure that the Court does "not take it upon [itself] to extend the waiver beyond that which Congress intended." *Smith*, 507 U.S. at 203; see *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."). That rule of construction applies not only to determining whether the government is liable to suit generally, but also to identifying precisely which claims and remedies are permitted. See, *e.g.*, *Department of Energy* v. *Ohio*, 503 U.S. 607, 615, 620-627 (1992) (narrowly construing which type of damages fall within waiver for "civil penalties"); *Price* v. *United States*, 174 U.S. 373, 375-377 (1899) (even where waiver of immunity is clear, questions of scope of waiver, types of damages permitted, and "contingencies in which the liability of the government is submitted to the courts" remain subject to the rule of narrow construction).

The FTCA is no exception. Like other waivers of sovereign immunity, fundamental separation-of-powers principles require that the language be construed cautiously and that the congressionally enacted text be given its straightforward effect. The power to waive sovereign immunity resides exclusively in the hands of Congress. Neither the Executive Branch nor the Judicial Branch can effect a waiver through the exercise of their respective powers. See *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990); *United States* v. *Shaw*, 309

U.S. 495, 501-502 (1940). This Court's strict construction of statutory waivers of immunity thus ensures that courts do not mistakenly impose burdens on the public fisc or impair, through the threat of damages, the operation of vital governmental activities. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955) ("Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction."). Accordingly, "the proper objective of a court attempting to construe" Section 2680(b) "is to identify those circumstances which are within the words and reason of the exception * * * no more," but just as importantly, "no less." *Kosak*, 465 U.S. at 853-854 n.9 (internal quotation marks omitted).

B. The Plain Meaning Of "Transmission Of Letters Or Postal Matter" Includes The Act Of Delivering Letters Or Postal Matter Directly To A Postal Customer

1. Dictionary definitions of "transmission" include delivery

Today, as at the time of the FTCA's enactment, the ordinary meaning of "transmission" is the "[a]ct, operation, or process, of transmitting," and "transmit," in turn, is defined as "[t]o send or transfer from one person or place to another." *Webster's New International Dictionary of the English Language* 2692-2693 (2d ed. 1948); see also *Black's Law Dictionary* 1505 (7th ed. 1999) (defining "transmit" as "to send or transfer (a thing) from one person or place to another"); *Funk & Wagnall's New Standard Dictionary of the English Language* 2551 (1946) (defining "transmit" as "[t]o send through or across; pass or hand down; transfer"); *Webster's New International Dictionary of the English*

Language 2186 (1917) (defining "transmission" as the "[a]ct of transmitting, or state of being transmitted; as, the *transmission* of letters, news, and the like"); *id.* at 2186-2187 (defining "transmit" as "to send or transfer from one person or place to another"). Indeed, the consistent definition of "transmit" and "transmission" as conveying items—including letters in particular—from a sender to a recipient extends back centuries. See, *e.g.*, Noah Webster, *American Dictionary of the English Language* (1828) (defining "transmission" as "[t]he act of sending from one place or person to another; as the *transmission* of letters, writings, papers, news and the like"); *ibid.* (similar for "transmit"); 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "transmission" as "[t]he act of sending from one place to another, or from one person to another"); *ibid.* (similar for "transmit"); *The Royal Standard English Dictionary* 472 (1798) (defining "transmit" as "to send from place to place").

That common understanding of the term "transmission" necessarily encompasses the direct delivery of mail to a postal customer or destination, because that is the consummate step in conveying, transferring, and sending mail "from one person or place *to another*." *Webster's New International Dictionary*, *supra*, at 2692-2693 (2d ed. 1948) (emphasis added); *Webster's New International Dictionary*, *supra*, at 2187 (1917) (emphasis added); *Black's Law Dictionary*, *supra*, at 1505 (emphasis added); see also 1 *A Dictionary of the English Language* (defining "deliver" as "[t]o transmit").

Underscoring that ordinary understanding of "transmission," petitioner herself has described the delivery of her mail as "the designated end-point of the transmittal" and has acknowledged that her mail was "transmitted to

the correct address." Pet'r Answer to Def. Mot. to Dismiss at 7; see also Pet'r C.A. Br. 7 (exception for "improper transmittal is designed to provide immunity for the normal risks in mail delivery").

2. Historical and contemporary usage of "transmission" includes the act of delivery

Congress enacted the phrase "transmission of letters or postal matter" against a historical practice of employing the term "transmission" or "transmit" and its conjugates specifically in postal statutes as an umbrella term referring to the Postal Service's unique national role in handling, processing, and—of most relevance here—delivering mail to a final destination. See, *e.g.*, Act of Mar. 3, 1845, ch. 43, § 6, 5 Stat. 734 (deputy postmasters authorized "to transmit *to any person or place*" official letters or packages free of charge) (emphasis added); An Act Authorizing the Transmission of Letters and Packets to and from Mrs. [William Henry] Harrison," ch. 19, 5 Stat. 461 (Sept. 9, 1841); Act of Apr. 30, 1810, ch. 37, § 39, 2 Stat. 604 (militia officials may "by mail * * * transmit *to said generals*, any [specified] letter or packet") (emphasis added).[4]

---

[4] See also Act of Aug. 4, 1955, ch. 560, § 1, 69 Stat. 497 (providing that certain keys and other small articles "may be transmitted through the mails to [an identified] address"); Act of Mar. 23, 1953, ch. 10, § 1, 67 Stat. 7 (providing that mail sent by certain service members "shall be transmitted in the mails free of postage," and that some such letters "shall be transmitted to destination by air mail"); Act of July 12, 1950, ch. 460, § 1, 64 Stat. 336 (mail of service members in Korea and other designated areas shall be "transmitted to destination" free of postage and, when feasible, by air mail); Act of Mar. 3, 1863, ch. 71, § 27, 12 Stat. 705 (authorizing the Postmaster General to "provide by uniform regulation for transmitting unpaid and duly certified letters of soldiers,

Usage of "transmit" or "transmission" as a comprehensive reference to the Postal Service's role not just in receiving and processing mail, but also in delivering it to a person or place continues to the present day. Indeed, the criminal prohibitions on private mail delivery contained in the Private Express Statutes, see generally *Regents of the Univ. of Ca.* v. *Public Employment Rela-*

---

sailors, and marines in the service of the United States to destination"); Act of Mar. 3, 1845, ch. 43, § 2, 5 Stat. 733 (providing that specified newspapers "may be transmitted through the mail * * * to all subscribers or other persons"); *id.* § 7, 5 Stat. 735 (Members of Congress authorized "to transmit, free of postage, to any post office" certain documents); *id.* § 11, 5 Stat. 736 ("[N]othing contained in this act shall be construed to prohibit the conveyance or transmission of letters, packets, or packages, or other matter, to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by a special messenger employed only for the single particular occasion."); *id.* § 12, 5 Stat. 736 (imposing penalties on "all persons * * * who * * * transmit by any private express, or other means by this act declared to be unlawful, any * * * mailable matter * * *, or who shall place or cause to be deposited at any appointed place, for the purpose of being transported by such unlawful means, any matter or thing properly transmittable[] by mail * * * , or who shall deliver any such matter * * * for transmission to any agent or agents of such unlawful expresses"); An Act Authorizing the Governors of the Several States to Transmit, by Mail, Certain Books and Documents, ch. 168, 4 Stat. 741 (June 30, 1834) (governors authorized "to transmit by mail * * * [specified documents] to the executives of other states"); Act of Mar. 3, 1825, ch. 64, § 40, 4 Stat. 113 ("That the adjutant general of the militia of each state and territory shall have the right to receive, by mail, free of postage, from any major general or brigadier general thereof, and to transmit to said generals, any letter or packet, relating solely to the militia."); *id.* § 43, 4 Stat. 114 ("the Postmaster General shall * * * transmit to the first comptroller of the treasury an account"); Act of May 8, 1794, ch. 23, § 13, 1 Stat. 359 (certificate and receipt for foreign mail "shall be * * * transmitted to the Postmaster General").

tions Bd., 485 U.S. 589, 593 (1988), speak in terms of unlawfully "transmit[ting]" or the "transmission" of letters. 18 U.S.C. 1696(b) and (c). Likewise, criminal laws regulating the mailing of injurious or potentially dangerous articles, such as medicines, poisons, and scorpions, generally proscribe their "transmission in the mails" except when the "transmission" is "to," "from," or "between" specified individuals or entities. 18 U.S.C. 1716(b), (c), (d) and (e). That language necessarily embraces the Postal Service's actual delivery of the regulated item "to" the authorized recipient.

The sheer volume of references to "transmit" and "transmission" in postal statutes defies an exhaustive listing. And the commonality of the terms, in candor, precludes the argument that they have a singularly exclusive signification in every instance in which they are employed. But the overwhelming usage of "transmit" and "transmission" in federal postal laws and in the postal context generally, both historically and contemporaneously, either explicitly embraces the act of delivery to a destination or person, see pages 13-15 & n.4, *supra*, or functions as an umbrella term for the person-to-person or place-to-place direct handling, processing, and delivery of mail by the Postal Service.[5] That is also con-

---

[5] See 39 U.S.C. 3011(a)(2) (discussing certain advertisements that are "tendered for transmission through the mails"); 39 U.S.C. 3014(b) (regulating certain plants "tendered for transmission through the mails"); 39 U.S.C. 3201(4) (2000 & Supp. II 2002) ("'franked mail' means mail which is transmitted in the mail under a frank"); 39 U.S.C. 3210, title ("Franked mail transmitted"); 39 U.S.C. 3210(a)(4) ("transmission through the mails"); 39 U.S.C. 3214 ("transmission in the international mails"); 39 U.S.C. 3217 ("reciprocally transmitted in the domestic mails"); 39 U.S.C. 3623(d) ("transmission of letters sealed against inspection"); 7 U.S.C. 7760 (providing for the "terminal inspection" of

sistent with judicial usage in the postal context, see *Dunlop* v. *Munroe*, 11 U.S. (7 Cranch) 242, 270 (1812) ("An entry on the post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage."), and with Congress's usage of "transmit" and "transmission" in a variety of other laws,

plants, plant products, and plant pests "transmitted" by the Postal Service); 10 U.S.C. 312(a)(5) (exempting from militia duty all "[p]ersons employed by the United States in the transmission of mail"); Act of June 29, 1955, ch. 224, 69 Stat. 191 (authorizing and directing the Postmaster General "to permit the transmission in the mails * * * of [certain] live scorpions"); Act of Aug. 15, 1953, ch. 511, 67 Stat. 614 (providing for reimbursement of the Post Office Department "for the transmission of official Government-mail matter"); Act of May 8, 1952, ch. 247, 66 Stat. 67 (allowing the Postmaster General to place certain limitations on "[t]he transmission in the mails of poisons for scientific use"); Act of June 7, 1924, ch. 375, 43 Stat. 668 (providing that certain publications, "when furnished by an organization, institution, or association not conducted for private profit, to a blind person without charge, shall be transmitted in the United States free of postage"); see also Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Annex (Canada), § II ("Transmission through postal channels" as a means of service) (reproduced as a note to Fed. R. Civ. P. 4); *id.* Annex (Venezuela), § 3; United States Post Office Dep't, *Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1946*, at 1 (1947) ("With a sure, swift, and inexpensive method of *transmitting* letters, printed information, money, and merchandise, * * * our country is kept more united, broader and more enlightened outlooks are attained, better standards of living are developed, and social and business life immeasurably advanced.") (emphasis added); but see 39 U.S.C. 403(a) ("receive, transmit, and deliver").

where the term similarly refers to the actual delivery of an item to another person or place.[6]

3. The context and structure of the postal exception encompass the direct delivery of mail to postal customers

The context and structure of Section 2680(b) further demonstrate that the "negligent transmission" of mail includes the ultimate act of delivering mail to a postal customer. That is because the phrase's companion statutory terms exempting the "loss" or "miscarriage" of mail necessarily refer to errors in, *inter alia*, the deliv-

[6] See, *e.g.*, Act of Jan. 28, 1987, Pub. L. No. 100-1, 101 Stat. 3 ("[T]he President shall transmit to the Congress not later than January 30, 1987, the Economic Report."); Act of Jan. 9, 1985, Pub. L. No. 99-1, § 1, 99 Stat. 3 (nearly identical language for budget and economic report); Act of Jan. 13, 1965, Pub. L. No. 89-1, 79 Stat. 3 (same); Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 2(a), 98 Stat. 3192 (certain provisions for reorganization of executive agencies "may take effect only if the [reorganization] plan is transmitted to Congress * * * on or before December 31, 1984"); Act of Feb. 15, 1972, Pub. L. No. 92-232, 86 Stat. 39 ("[e]xtending the date for transmission to the Congress of the report of the Joint Economic Committee"); Act of June 11, 1940, ch. 305, 54 Stat. 263 (directing a certain commission to "transmit to Congress on or before January 3, 1942, a detailed statement of the manner of expenditure of" certain funds); Act of May 29, 1928, ch. 859, § 2, 45 Stat. 946 (directing the Secretary of State to "transmit to the two Houses of Congress copies in full of" certain certificates relevant to the appointment of presidential electors); Act of Oct. 8, 1966, Pub. L. No. 89-633, 80 Stat. 879 ("authoriz[ing] the Secretary of Agriculture to hold prepayments made to the Secretary by insured loan borrowers and transmit them to the holder of the note in installments as they become due"); Act of Apr. 19, 1904, ch. 1398, 33 Stat. 186 (directing the Commissioner of the General Land Office to "transmit to [registers of United States land offices] the original papers specified in [certain legal proceedings]").

ery of mail to a customer. The loss of mail is, at its core, the failure to get mail—to deliver it—to its intended destination. Likewise, a "miscarriage" of mail commonly refers to the erroneous delivery of mail, such as its misdirection to the wrong person or other form of failure to arrive at the proper destination. See *Webster's New International Dictionary*, *supra*, at 1568 (2d ed. 1948) (defining "miscarriage" as the "[f]ailure (of something sent) to arrive").

Accordingly, read as a whole and consistent with Congress's established use of the term "transmission" in the postal context, Section 2680(b) insulates from the threat of damage suits under the FTCA the United States' performance of the quintessentially postal function of directly delivering the mail to a postal patron.

C. Section 2680(b) Excepts From Liability "Any Claim" Arising Out Of The Negligent Delivery Of Mail To A Postal Customer, Including Claims Of Both Physical Injury And Damage To The Mail

1. The statutory text does not distinguish between types of injuries

Petitioner does not dispute that "negligent transmission" of the mail includes negligent delivery of the mail. Instead, petitioner argues (*e.g.*, Br. 3, 4) that Section 2680(b) excepts from liability only a subcategory of damage claims arising out of the negligent delivery of mail. Specifically, petitioner and her amici contend that "negligent transmission" reaches only claims arising out of "alteration or injury to the package or letter" (Br. 7 (quoting *Suchomajcz* v. *United States*, 465 F. Supp. 474, 476 (E.D. Pa. 1979)), and not claims of "injury to persons" (Pet. Br. 4). See also Washington Legal Found. Br. 7 ("Negligent transmission refers to claims asserting

negligence in ensuring that the mail reach the consumer undamaged and on time.").

a. The text's plain meaning

The short answer to petitioner's argument is that the statutory text does not draw that distinction. Section 2680(b) excepts from the FTCA's coverage "[a]ny claim" arising out of the loss, miscarriage, or negligent transmission of mail. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)).[7] If Congress had wanted to confine the exception to claims of damage to the mail itself, Congress could have easily and much more naturally written the exception to preclude liability for "damage to the mail." Cf. 28 U.S.C. 2680(c) (addressing claims pertaining to the "loss of goods, merchandise, or other property").

b. The text's legislative evolution

Congress had multiple opportunities to enact the version of the postal exception that petitioners espouse.

---

[7] See *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 130-131 (2002) ("Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement."); *Brogan* v. *United States*, 522 U.S. 398, 400-401 (1998) ("any false, fictitious or fraudulent statements" include false statements of all kinds and is not restricted to such statements "that pervert governmental functions"); *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); 1 *The Oxford English Dictionary* 378 (1933) ("any" defined as "indifference as to the particular one or ones that may be selected"; embracing all "no matter which" and "of whatever kind").

Perhaps the earliest version of the postal exception appeared in a proposed bill that expressly dichotomized the government's liability for claims of "damage to or loss of privately owned property," and claims for "personal injury or death." S. 1912, 69th Cong., 1st Sess. Title I, §§ 1(a), 8(a)(1), Title II, § 201 (Mar. 17, 1926). The postal exception appeared in Title I of the bill, which addressed property damage claims, but that exception to liability was not repeated in Title II's provisions concerning liability for personal injury claims. *Ibid.* Other bills repeated petitioner's proposed distinction. See H.R. 17168, 71st Cong., 3d Sess. Title I, §§ 1, 3(a)(1), Title II (Feb. 18, 1931); H.R. 9285, 70th Cong., 2d Sess. Title I, §§ 1(a), 4(a)(1), Title II (Feb. 16, 1928); H.R. 9285, 70th Cong., 1st Sess. Title I, §§ 1(a), 8(a)(1), Title II (Feb. 16, 1928). Not one of them was enacted.

Instead, by the time of the FTCA's enactment, Congress had abandoned the differential treatment of claims for property damage and personal injury. Subsequent bills specifically made the postal exception applicable to both personal injury and property damage claims. See, *e.g.*, S. 4567, 72d Cong., 1st Sess. Titles I, II, and § 206(1) (1932) (separately addressing property (Title I) and personal injury (Title II) claims, but making the postal exception applicable to both Titles); S. 1833, 73d Cong., 1st Sess. Titles I, II, and § 206(1) (1933) (same); S. 1043, 74th Cong., 1st Sess. Titles I, II, and § 206(1) (1935) (same); H.R. 129, 73d Cong., 1st Sess. §§ 1, 6(1) (1933) (expressly waiving liability for both property and personal injury claims in one Section, but then excepting "[a]ny claim" arising from the loss, miscarriage, or negligent transmission of the mail in a Section that applies to all "[t]he provisions of this Act"); H.R. 2028, 74th Cong., 1st Sess. §§ 1, 6(1) (1935) (same); S. 2690, 76th Cong., 1st Sess. Title I, § 1, Title III, § 303(1) (1939) (same).

The final legislation then streamlined the statutory text, enacting a single waiver of liability for "injury or loss of property, or personal injury or death," 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2679(b)(1), and concomitantly making the postal exception applicable to "[a]ny claim" arising out of the loss, miscarriage or negligent transmission of the mail, 28 U.S.C. 2680(b). The legislative evolution of that final text thus underscores that, in excepting "[a]ny claim" arising out of the negligent transmission of the mail, Congress meant exactly what it said. Indeed, Congress enacted that more comprehensive exception at a time when it was fully aware of the risk of injury to persons that could result from the "transmission" through the mail of "poisonous drugs," "medicines," and other potentially dangerous materials. Act of June 25, 1948, ch. 645, § 1716, 62 Stat. 782; see also United States Post Office Dep't, *Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1946*, at 55 (1947) (*1946 Annual Report*) (table documenting nearly 2000 postal investigations in 1946 pertaining to the mailing of firearms, narcotics, explosives, poisons, inflammables, and intoxicants). While petitioner's proposed exception for damage to the mail might accord with Congress's "discarded draft[s]," it is the statutory text that Congress actually adopted that controls, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993), especially when the Court is construing a substantive limitation on a waiver of sovereign immunity.

c. The exception's purpose

Like almost all of Section 2680's exceptions to liability, the postal exception is written in terms of the governmental activity protected, not the particular type of injury suffered. See 28 U.S.C. 2680(a) (protecting "execution of a statute or regulation" and the "exercise or performance" of "discretionary function[s]); 28 U.S.C. 2680(c) (insulating the assessment and collection of taxes or custom duties and the detention of property by law enforcement officials); 28 U.S.C. 2680(e) (administration of the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*); 28 U.S.C. 2680(f) (imposition or establishment of quarantine); 28 U.S.C. 2680(i) (fiscal operations and monetary regulation); 28 U.S.C. 2680(j) (combatant activities of the military); 28 U.S.C. 2680(*l*) (Tennessee Valley Authority operations); 28 U.S.C. 2680(m) (Panama Canal Company operations); 28 U.S.C. 2680(n) (federal banks); accord *Sosa*, 124 S. Ct. at 2777 n.1 (Ginsburg, J., concurring in part and concurring in the judgment) (Section 2680(b) exception "focus[es] on a governmental act or omission").

That focus makes sense because a primary purpose of the postal exception, along with most of the other FTCA exceptions, is to protect from liability "certain governmental activities which should be free from the threat of damages suit." S. Rep. No. 1400, *supra*, at 33; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) (same); see *Molzof* v. *United States*, 502 U.S. 301, 311-312 (1992) ("Congress' primary concern in enumerating the § 2680 exceptions was to retain sovereign immunity with respect to certain governmental *functions* that

might otherwise be disrupted by FTCA lawsuits.").[8] The goal of insulating vital governmental activities from the inhibitions and constraints generated by the threat of damages suits can be achieved only if the protection comprehends all potential claims. Execution of the Postal Service's unique Nation-binding service of handling and delivering staggering quantities of mail across the Country would be impaired as much by the threat of damages for injury to persons—whether arising out of a fall (as in this case), the unknowing delivery of mail containing anthrax or a letter bomb, or the delay of or damage to medications sent by mail—as by the threat of damages for torn or water-soaked mail.

Section 2680(b), in short, is designed to be an up-front substantive protection for a governmental activity that has long been considered a "sovereign necessity." *Greenburgh Civic Ass'ns*, 453 U.S. at 121. Its application does not, as petitioner posits, turn on the post hoc happenstance of whether property or personal injury results.

2. Petitioner's own arguments support the exemption of personal injury claims

a. Petitioner's arguments embrace personal injury claims

Although petitioner starts out proposing a sharp distinction in Section 2680(b) between injuries to persons and injuries to the mail itself, she is unable to embrace that position wholeheartedly. Petitioner and her amici

---

[8] See also *Kosak*, 465 U.S. at 858; *Varig Airlines*, 467 U.S. at 808 (Section 2680 exceptions "protect certain governmental activities from exposure to suit by private individuals"); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 n.4 (1980) (per curiam).

concede (Pet. Br. 4, 6; Washington Legal Found. Br. 7) that claims arising from the "delay" of mail delivery must also fall within Section 2680(b). Delay, however, infrequently damages the mail itself; it most often causes injury to the sender or recipient. That damage can be financial (where money or commercial papers are en route), psychic (where an intimate or familial communication is critically delayed or disrupted), or physical (where needed medication, medical equipment, or perishable food is delayed). But the injury is unquestionably to a person rather than to the mail.

In addition, even petitioner does not suggest that the explicit exceptions for "any claim" arising out of the "loss" or "miscarriage" of mail could conceivably be read to exclude claims of injury to persons from those missteps. Indeed, neither of those errors in mail delivery necessarily involves actual damage to the mail. In fact, miscarriage often occurs when mail is delivered intact to the wrong addressee. The injury in instances of loss and miscarriage, as in cases of delay, not infrequently involves harm to the person, which could be financial, physical, or emotional, such as if poisonous drugs or bacterial samples were misdelivered to a home rather than to a research laboratory, or if the delivery of intimate or sensitive mail to the wrong recipient invaded the sender's or recipient's privacy. Yet petitioner makes no effort to explain how Section 2680(b)'s straightforward and categorized bar to "any claim" arising out of the "loss," "miscarriage," or "negligent transmission" of the mail could admit of such on-again, off-again coverage of injuries to persons.

b. The telegraph analogy is of no help to petitioner

Petitioner suggests (Br. 6-7) that the Court should define "negligent transmission" by reference to telegraph transmissions, where, in petitioner's view, liability was imposed only for "the inadvertent substitution of words" in the delivery of the telegram. *Id.* at 7 (quoting *Suchomajcz*, 465 F. Supp. at 476). As an initial matter, petitioner fails to establish that the few citations she offers document a "widely accepted *common-law* meaning" of "negligent transmission," or that it had become a "term[] of art in which are accumulated the legal tradition and meaning of centuries of practice." *Molzof*, 502 U.S. at 306-307 (emphasis added). The two cases and two state statutes upon which petitioner relies fall far short of the type of showing necessary to contradict the plain text of the exception or to supplant nearly two centuries of established usage of the term "transmission" by Congress specifically in the postal context. Moreover, the analogy to the telegraph context is of limited utility because the agent transmitting a telegram plays a role in transcribing the message to be delivered that has no ready analog in the postal context.

In any event, to the extent the argument has any relevance, it reinforces the government's point. Much like claims of delay in mail delivery, liability for negligent transmission of a telegram was, at bottom, liability for negligence in the manner of the telegram's delivery to the recipient. While telegrams, by their very nature, involve the deciphering of code and the transcribing of words prior to physical delivery, the point is the same: the telegraph cases on which petitioner relies (Br. 6-7) imposed liability for negligence in how the product was delivered to the recipient. See *Abraham* v. *Western*

Union Tel. Co., 23 F. 315 (C.C. Or. 1885) (mistranslation of message) (cited in *Suchomajcz*, 465 F. Supp. at 476); *White* v. *Western Union Tel. Co.*, 14 F. 710 (C.C. Kan. 1882) (failure to transmit message) (cited in *Suchomajcz*, 465 F. Supp. at 476); see also *Western Union Tel. Co.* v. *Priester*, 276 U.S. 252 (1928) (mistranslation of information).

In addition, tort liability for the negligent transmission of telegrams did include claims for injury to persons. See *Western Union Tel. Co.* v. *Taylor*, 100 So. 163, 165 (Fla. 1924); *Western Union Tel. Co.* v. *Bennett*, 57 So. 87, 88 (Ala. Ct. App. 1911); Thomas A. Street, *Negligent Transmission of Telegrams*, *in* 1 *Foundations of Legal Liability* 436, 456 (1906). To be sure, the type of personal injury involved in those cases was mental anguish rather than physical injury. But that is because of the infrequency with which persons might trip over or otherwise be physically injured by a telegram at the point of delivery, rather than evidence of some unarticulated doctrinal divide.

At the end of the day, petitioner's proposed interpretation of "negligent transmission," with its variable inclusion and exclusion of personal injury claims, has no firm anchor in text, history, or logic. Petitioner does not dispute that "negligent transmission" includes negligence in delivery, and admits to the coverage of at least some claims (although it is unclear which) that result in injuries to persons rather than just to the mail itself, and at least some claims (although it is unclear which) arising from the manner of delivery, apparently including claims based on mental anguish (but see Compl. para. 9), but apparently not physical injuries. The better reading is to hew to the natural meaning of transmission, as reinforced by Congress's repeated usage of

the term "transmission" in postal statutes over the centuries as an umbrella reference to the unique postal service of handling and ultimately delivering mail from senders to recipients.

3. The historical and logical distinction between petitioner's claim and motor vehicle accidents underscores that a mail recipient's claim of negligent delivery falls within section 2680(b)

As this Court explained in *Kosak*, the legislative history of the FTCA indicates an intent to subject the United States to liability for injuries arising from some motor vehicle accidents, including those involving postal vehicles. 465 U.S. at 855. The Court then commented, in dicta:

> In order to ensure that § 2680(b), which governs torts committed by mailmen, did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, "the loss, miscarriage, or negligent transmission of letters or postal matter"—thereby excluding, by implication, negligent handling of motor vehicles.

Ibid. But, contrary to petitioner's assertion (Br. 4-5), the assumption that Section 2680(b) does not apply to a postal employee's negligent handling of a motor vehicle does not help her cause, which falls squarely within the exception's plain text and which has nothing to do with motor vehicle operations.

Nor does anything in *Kosak* suggest the type of personal injury/mail damage distinction that petitioner (with caveats and exceptions) proposes. To the con-

trary, *Kosak* highlights the court of appeals' proper distinction between claims that arise directly from negligence in the unique postal function of handling and delivering the mail, and those claims that arise from routine negligence in the performance of auxiliary activities that are common to virtually all government agencies and that implicate the mail only by happenstance. This case falls squarely in the former category. As the Court observed in *Kosak*, Section 2680(b) was intended to bar suits based on alleged "torts committed by mailmen." 465 U.S. at 855. The basis for petitioner's claim is precisely such a tort, arising out of the mail carrier's placement of the mail at the point of delivery.

Consistent with *Kosak*, Section 2680(b) must be read and applied according to its terms, "no less and no more." 465 U.S. at 854 n.9. The exception does not extend broadly to any claim that might arise "in respect of" the mail, 28 U.S.C. 2680(c), or "arising from the activities of," 28 U.S.C. 2680(m), the Postal Service. Only claims directly "arising out of" the Postal Service's handling (*i.e.*, the loss, miscarriage, or negligent transmission) "of letters or postal matter" fall within the exception to FTCA liability. 28 U.S.C. 2680(b); see *Robinson* v. *United States*, 849 F. Supp. 799, 802 (S.D. Ga. 1994) ("[T]his exception was intended to apply to the handling of mail and postal matter alone.").

That careful focus on the duty of care allegedly breached—whether negligent operation of a vehicle, negligent maintenance of a building, or the negligent handling of mail—is consistent with this Court's decisions in *United States* v. *Neustadt*, 366 U.S. 696 (1961), and *Block* v. *Neal*, 460 U.S. 289 (1983), which hewed to a traditional definition of the tort of "misrepresentation" for purposes of the FTCA's negligent misrepresentation

exception, 28 U.S.C. 2680(h). The Court concluded that a more expansive reading of the exception to include "many familiar forms of negligent conduct [which] may be said to involve an element of 'misrepresentation,' [only] in the generic sense of that word," would have gone far beyond the congressional design. *Neustadt*, 366 U.S. at 711 n.26.

Similarly here, an interpretation of the postal exception that included every routine motor vehicle accident might well go beyond congressional design. The prototypical motor vehicle accident does not involve a postal customer complaining (as petitioner does) about the timing, content, or manner in which mail was sent or received, or asserting an injury caused by the mail itself. The motor vehicle case commonly involves a third party (neither a sender nor recipient) who is injured by the negligent operation of a vehicle—an act of negligence that is at most circumstantially related to the mail. Indeed, the fact that the vehicle is carrying mail is generally irrelevant to the nature of the claim or the injury. The claim would be the same whether the mail truck was empty or full.

Importantly, the governmental activity charged to be negligent and sought to be regulated through the mechanism of tort liability in the typical motor vehicle case is the routine operation of a vehicle under generally applicable safety rules, not the quintessential governmental service of handling and delivering the mail. While the operation of motor vehicles no doubt facilitates the Postal Service's operations, that activity is not unique to the Postal Service. Operating motor vehicles is something that thousands of non-postal government employees and millions of private people do every day. Nor is motor vehicle operation an inherent or defining compo-

nent of the singular role that the postal system plays within the government. The postal system functioned for well over a century before the advent of motor vehicles, and the Postal Service continues to deliver a significant percentage of the mail by letter carriers who walk, rather than drive, their routes.[9]

The postal system, however, has never and could never function without the act of delivering mail as such. The very essence of a postal system—the indispensable service that the Postal Service alone, and no other government agency, provides—is determining *what* items

[9] That does not mean that all tort claims arising out of postal vehicle accidents automatically fall outside of exception in Section 2680(b). For example, neither the sender nor the intended recipient of letters that were lost, damaged, or delayed as a result of a motor vehicle accident would have a claim, because such a claim would arise out of the "loss, miscarriage, or negligent transmission" of the letters themselves. Moreover, if the particular contours of a claim and the circumstances of the accident indicate that the accident occurred as a result of a postal policy or directive, or as part of the direct transmission of the mail to a customer (for example, if the customer backing out of his driveway asks the mail carrier to pass his mail through the car window, and, in the process of handing off the mail, the postal vehicle bumps the recipient's car), a close question as to the exception's applicability would arise. See also *State* v. *Burton*, 103 A. 962 (R.I. 1918) (Navy driver exceeded speed limit under the command of a naval officer that military necessity required him to proceed with the utmost dispatch). In addition, the government disagrees with petitioner's assertion (Br. 7) that the postal exception would not apply to tort claims brought by individuals struck by mail pouches thrown from moving trains at delivery stations. The cited court of appeals cases did not have occasion to address the applicability of the postal exception, as they turned upon different preliminary questions concerning the litigation of indemnification claims under the FTCA. See *Chicago, Rock Island & Pac. Ry.* v. *United States*, 220 F.2d 939 (7th Cir. 1955); *United States* v. *Acord*, 209 F.2d 709 (10th Cir.), cert. denied, 347 U.S. 975 (1954).

may be transmitted through the mails and *when* and *how* billions of pieces of mail will be processed from millions of senders and physically delivered to millions of homes, businesses, and postal boxes across the Country. Indeed, the consummate act of delivery is the *raison d'etre* of the postal system—the receipt and processing of mail are just steps towards the ultimate end of delivering it to an intended recipient. See *Greenburgh Civic Ass'ns*, 453 U.S. at 133 (the Postal Service is tasked with "operat[ing] as efficiently as possible a *system for the delivery of mail* which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south"). How the mail, in a Nation-binding system of universal service, is delivered to its recipients —whether through modern-day residential letter boxes, dropping mail bags to the ground from primitive airplanes,[10] or, as in 1831, "dropp[ing] an enormous bundle of letters at the door of [an] isolated dwelling"[11]—is a central component of the transmission of the mails.

Further, as this Court recognized in *Greenburgh Civic Ass'ns*, in rejecting a First Amendment claim of access to home letter boxes, the United States has a vital interest in insulating the final act of delivery of mail from interference and obstruction, and in ensuring that postal customers can readily distinguish governmentally delivered mail from other communications. For that reason, those persons who want delivery of mail "at their home or business [must] do so under the *direction*

[10] See United States Postal Serv., *Pub. No. 100, The United States Postal Service: An American History, 1775-2002*, at 27 (Sept. 2003) (*An American History*).

[11] 1 *Democracy in America*, *supra*, at 329 n.6.

and control of the Postal Service." 453 U.S. at 126 (emphasis added).

Thus, petitioner's claim lies both textually and practically at the heart of the FTCA's postal exception. She allegedly was injured, not by a mail truck or a slippery floor in a postal building (see Pet. Br. 19-20), but directly "by letters or postal matter" themselves, due to the allegedly negligent manner in which those "letters or postal matter" were transmitted to her home. The governmental action—the delivery of mail—that she alleges caused her injury is unique to the Postal Service. It is not performed by any other governmental agency. Petitioner's claim, moreover, does not seek to hold the government to the same, well-established rules that broadly govern private conduct, such as the operation of all motor vehicles, but instead seeks to assign to private individuals and the courts, through the mechanism of tort liability, the quintessentially postal judgment of how best to deliver letters or postal matter to their intended recipients when the designated mail receptacle is too small, too damaged, or otherwise unable to accommodate the delivery.

That distinction between the direct handling and processing of the mail and the safe operation, consistent with generally applicable traffic regulations, of vehicles that happen to be transporting the mail is almost as old as the postal system itself and would have been familiar to Congress. Long before the enactment of the FTCA, a number of cases, including two from this Court, had recognized that individuals operating vehicles transporting the mail could, in the absence of contrary federal direction, be subjected to generally applicable state regulations governing traffic safety without working an impermissible "stoppage of the mail" or otherwise unconstitutionally interfering with the distinctly federal function of handling and delivering the mail to its intended recipients. For example, in *Johnson* v. *Maryland*, 254 U.S. 51 (1920), in which the Court held that a State could not require the driver of a postal truck to obtain a state license, the Court noted:

> It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. * * * This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence.

Id. at 56 (citing *Commonwealth* v. *Closson*, 118 N.E. 653 (Mass. 1918)); see *Illinois Cent. R.R.* v. *Illinois*, 163 U.S. 142, 154 (1896) ("The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders[,] * * * [and] [i]t may well be * * * that the arrangements made by the company with the post-office department of the United States cannot have the effect of abrogating a reasonable police regulation of the state.") (dicta); *Closson*, 118 N.E. at 653-654 (general traffic rules that are "well adapted for the security and protection of all travelers" may be enforced against a mail carrier, because federal law does not "confer extraordinary rights upon mail carriers to use the ways as they please").[12]

---

[12] See also *Ex parte Willman*, 277 F. 819, 823 (S.D. Ohio 1921) (citing and discussing cases); *Virginia* v. *Stiff*, 144 F. Supp. 169, 171-172 (W.D. Va. 1956) (citing and discussing cases); *Vogler* v. *Greimann*, 78

As the Court explained in *Johnson*, such generally applicable rules of traffic safety implicate the mail only "incidentally" and "remotely," and do not target or "lay[] hold of" mail carriers "in their specific attempt" to deliver mail. 254 U.S. at 56, 57; see also *Robinson*, 849 F. Supp. at 802 (distinguishing, for purposes of Section 2680(b), between claims that "apply to the handling of mail and postal matter alone" and those that arise "from the negligence of * * * employees in driving postal vehicles * * * or in performing other duties not directly involving postal matter"). Such tort claims, in other words, are "disassociated from the[] primary" and vital governmental activity protected by the postal exception, implicating the actual handling of the mail only

---

F. Supp. 575, 577 (D. Alaska 1948) ("The driver of a government mail vehicle, while engaged in his official duty, must comply with local traffic regulations in instances where no inconsistent rule of conduct has been prescribed for him by Congress or the Postmaster General.") (dicta); *Hall* v. *Commonwealth*, 105 S.E. 551, 552-553 (Va. 1921) (in the absence of contrary federal direction, mail carrier must obey state speed limit because that general regulation "does not attempt to control and does not in its operation even incidentally interfere in any way with the performance of duty of the federal employee"); *United States* v. *Hart*, 26 Fed. Cas. 193, 194 (C.C.D. Pa. 1817) (No. 15,316) (Washington, C.J.) (federal law prohibiting the "stoppage of the mail" does not apply to a city official's stopping of a mail carrier for "driving a carriage through a crowded or populous street, at such a rate or in such a manner as to endanger the safety of the inhabitants," where interference with the mail was temporary and a purely inadvertent consequence of enforcement of the general safety regulation). From the late 1800s through the first third of the 20th Century, many of the companies and persons transporting mail were government contractors (including the famed Pony Express), rather than government employees. See *An American History* 12-19. In some circumstances, such contractors might less readily claim a federal immunity from state regulation. Cf. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988).

indirectly. Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 546 (1947) (hearings and committee reports "stress[]" that the FTCA exceptions "are carefully worded * * * not to include the ordinary common-law torts of negligence of employees of * * * agencies disassociated from their primary purposes") (quoted at Pet. Br. 19).

By contrast, tort laws directly relating to—and thus regulating—the unique activity of delivering mail to postal patrons would not "incidentally," "remotely," *Johnson*, 254 U.S. at 56, 57, or only "temporar[il]y, *Hart*, 26 Fed. Cas. at 194, affect the mail as the indirect byproduct of a general law pertaining to an area of traditional state regulation. Petitioner's claim seeks to regulate substantively and permanently the delivery of mail *as such*, and it seeks to intrude into the most fundamental stage of mail transmission.

Tellingly, in the years leading up to the FTCA's enactment, the practice of home delivery of mail was still in its early stages, particularly outside major urban areas. United States Postal Service, *Pub. No. 100, The United States Postal Service: An American History, 1775-2002*, at 20-21 (Sept. 2003). Moreover, the transition away from person-to-person delivery to depositing mail in home letter boxes—a change driven by the significant time lost waiting to hand deliver mail to patrons and the resource-intensive process of attempting repeated re-deliveries—had just begun the decade before the FTCA's enactment and thus was still in its nascency. *Ibid.* It is one thing to assume that, in enacting the postal exception, Congress carried forward a judicially recognized distinction between the even-handed enforcement of generally applicable local traffic regulations and the traditionally federal role of handling and

delivering the mail between senders and recipients. It would be quite another thing to conclude in the face of the plain language of the postal exception that, through the FTCA, Congress intended to apply a patchwork quilt of tort regulation directly on the evolving practice of home delivery and the transition from time-intensive person-to-person delivery and re-deliveries to the modern-day practice of depositing or placing the mail unattended outside homes.

4. Tort claims based on the manner in which mail is delivered have a significant potential for fraud

Congress enacted the exceptions to FTCA liability not only to ensure that important governmental activities would "not be disrupted by the threat of damages suits," but also to avoid exposure "to liability for excessive or fraudulent claims." *Kosak*, 465 U.S. at 858; see also *id.* at 858 n.17 (citing legislative history); *Hatzlachh Supply*, 444 U.S. at 464 n.4; S. Rep. No. 1400, *supra*, at 33; *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (testimony of Alexander Holtzoff, Special Assistant to the Attorney General).

Permitting personal injury claims based on the delivery of mail to a recipient would render the Postal Service vulnerable to a broad range of fraudulent complaints. The volume of mail (and thus of potential tort complaints) handled by the Postal Service is staggering. The Postal Service employs 340,000 persons to deliver approximately 660 million pieces of mail to as many as 142 million different delivery points *each day*. *2004 Annual Report* 18, 22, 54. The Postal Service advises that the postal district in which petitioner resides has an average daily volume of 9 million pieces of mail to deliver. The sheer volume of the task and the carriers' dedication to the necessarily "swift completion of their appointed rounds," *id.* at 49, would make it exceedingly difficult for the Postal Service to track or document the manner or time in which individual pieces of mail were deposited with a recipient.

Moreover, while motor vehicle accidents almost universally occur on public thoroughfares and are frequently documented through police reports, most delivery mishaps would occur either within the privacy of the home or within its close environs, with few witnesses to the incident. And while the Postal Service is immediately aware of and able to investigate accidents involving its vehicles, the Postal Service generally would not even become aware of accidents based on the delivery of mail until a claim is filed, which could be as late as two years after the incident or after the plaintiff becomes aware of the injury. See 28 U.S.C. 2401(b); *United States* v. *Kubrick*, 444 U.S. 111 (1979). In addition, the mail recipient's close and almost exclusive control over the home, doorway, and other key areas would severely impair the Postal Service's ability to identify any potential precipitating conditions to the accident or to have access to and preserve relevant evidence. See *Bono* v. *United States*, 145 F. Supp. 2d 441, 446 (D.N.J. 2001) ("The potential for fraudulent claims is particularly high in cases of this type, where there are no witnesses to observe events after a letter carrier has completed his delivery."); *Hunt* v. *United States*, No. 01-2462-KHV, 2002 WL 553736, at *4 (D. Kan. Apr. 4, 2002) ("[B]ecause USPS witnesses are not typically present

after mail has been delivered, the potential for fraudulent claims is high.").[13]

As a result, construing Section 2680(b) to permit claims like petitioner's "would likely lead to an inundation of 'slip and fall' cases based on allegedly negligent mail delivery," which in turn would "likely disrupt USPS's ability to deliver mail." *Bono*, 145 F. Supp. 2d at 446. Congress enacted Section 2680(b) to shield the government and the courts from exactly that "potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year." *Birnbaum* v. *United States*, 436 F. Supp. 967, 974 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1978).

[13] The massive volume and universality, at low expense, of mail delivery provided by the federal postal service belie the assertions of petitioner (Br. 10) and her amici (Wash. Legal Found. Br. 1) that the Postal Service is no different from "any delivery service that leaves packages at the recipient's doorstep." No other organization bears the obligation of providing high- volume, universal, and nationally unifying service in a manner consonant with the ever-changing needs of national security. See *Flamingo Indus.*, 540 U.S. at 747. Furthermore, other services engage in a distinctly smaller overall volume of deliveries—generally limited to commercial package deliveries and express mail, see 39 C.F.R. Pt. 320—and they do so at enhanced prices that permit the sort of comprehensive package-by-package tracking needed to respond to claims like petitioner's. Many of those services attempt to provide the type of person-to-person delivery that became infeasible for the nationwide coverage of the Postal Service around the time of the FTCA's enactment. See p. 35, *supra*. And even those more elaborate (and expensive) services may not generally record delivery conditions or the precise location and situation of packages left without a signature.

Petitioner contends (Br. 11-13, 15-19) that the sole purpose of the postal exception was to withdraw from the FTCA's coverage claims already adequately addressed by the existing programs for registered and insured mail. But petitioner's argument does not fit either the statutory text or her legal theory. As an initial matter, petitioner's insistence (Br. 16) that, in enacting the postal exception, Congress was entirely unconcerned with the effect of tort liability on the uniquely sovereign and vital function of providing universal mail service for an enormous daily volume of letters and packages defies text, precedent, and common sense. See *Hatzlachh Supply*, 444 U.S. at 464 n.4 (explaining that the postal exception was "included because [it] related to activities for which, as a policy matter, the Government should be free from tort claims").[14] The broadly worded exception applies to "any claim," without regard to whether insurance or registration would protect the claimant. Moreover, given Congress's long-term concern with providing low-cost, universal mail service, it seems unlikely that Congress's singular goal in crafting the FTCA exception was to distinguish among postal patrons based on their ability to engage in limited self-protection. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 427 n.5 (1995) (omitting postal exception from a list of exceptions applying to "cases in which other

[14] See also *Molzof*, 502 U.S. at 311 ("The § 2680 exceptions are designed to protect certain important governmental functions and prerogatives from disruption."); *ibid.* (citing specifically to Section 2680(b), Court explains that "Congress has taken steps to protect the Government from liability that would seriously handicap efficient government operation") (quoting *United States* v. *Muniz*, 374 U.S. 150, 163 (1963)).

compensatory regimes afford relief"). Indeed, at the time of the FTCA's enactment, registered or insured mail accounted for barely one-half of one percent (.56%) of all mail sent. See *1946 Annual Report* 5, 28.[15]

Second, petitioner's argument ignores the fact that there *was* another "extant remedy" (Br. 16) at the time of the FTCA's enactment: the Postal Service's authority to settle personal injury claims for $500 or less. 31 U.S.C. 224c (1940). Similar authority continues today, with no such statutory cap on payments. See 39 U.S.C. 2603; 39 C.F.R. 912.2(b).[16]

Third, petitioner agrees (Br. 4-7) that, at the least, Section 2680(b) applies to all claims for damage to and delay of mail. But for almost all mail transmissions, there are two parties—a sender and a recipient. Registration and insurance are available only to the sender and generally protect only the sender.[17] Recipients have no assured means of recovering for the loss of or damage to their mail and its contents, whether money, gifts, family heirlooms, or important papers. In addition, petitioner agrees (Br. 4-6) that mail delays are covered by the exception. But insurance and registration alone offer no compensation to the recipient, and generally none to the sender, for injuries or damages arising from delayed delivery of medicine, papers, or tickets. United States Postal Serv., *Domestic Mail Manual*, Pt. 609.4.3(f) and (ae) (Sept. 1, 2005). Furthermore, insurance and indemnity through registered mail are categorically unavailable for items of sentimental value, the contents of film, videotapes, laser disks, x-rays, MRI or CAT scan images, negotiable instruments over $15, lottery tickets, perishable goods, or harm to live animals. *Id.* at Pt. 609.4.3(c), (e), (h), (j), (k), (r), (z) and (ab).

[15] Today, registered and insured mail constitute only .029% of all mail sent. See *2004 Annual Report* 22, 53.

[16] Section 2603 provides:

> When the Postal Service finds a claim for damage to persons or property resulting from the operation of the Postal Service to be a proper charge against the United States, and it is not cognizable under [the FTCA], it may adjust and settle the claim.

[17] The sender may permit the addressee to file a claim for insured mail, see United States Postal Serv., *Domestic Mail Manual*, Pt. 609.1.3, 609.5.5 (Sept. 1, 2005), but that decision remains within the discretion and control of the sender.

Rather than relying on a misunderstanding of legislative history, the better course is to read Section 2680(b) consistent with its plain meaning, its legislative evolution, and historical usage of the term "transmission" in postal statutes as an umbrella reference to the uniquely postal service of handling and delivering "letters or postal matter." That straightforward reading of the statutory text also is consonant with contemporaneous court precedent distinguishing between incidental, remote, and temporary regulation of mail transporters through the application of generally applicable traffic safety regulations designed to protect the public at large, and attempts to regulate directly the uniquely federal task of handling and delivering the mail between postal customers. Finally, according "negligent transmission of letters or postal matter" its natural and historic meaning respects and protects, as Congress intended, the uniquely vital and uniquely federal role that universal, efficient, and cost-effective delivery of an enormous daily volume of mail plays in promoting national development, growth, and cohesion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
Attorneys

MARY ANNE GIBBONS
General Counsel
LORI J. DYM
STEPHAN J. BOARDMAN
MARTINA M. STEWART
Attorneys
United States Postal Service

SEPTEMBER 2005

APPENDIX

STATUTORY APPENDIX

1. 28 U.S.C. 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgir Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2674 provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from

such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

3. 28 U.S.C. 2680 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

---

[1] So in original.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.